# In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 419

ANGELO PACCIONE, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINION BELOW

The *per curiam* opinion of the Court of Appeals (Pet. App. 11–12) is reported at 224 F. 2d 801. The District Court filed no opinion.

### JURISDICTION

The judgment of the Court of Appeals was entered on July 27, 1955 (Pet. App. 10). On August 22, 1955, Mr. Justice Clark extended the time for filing a petition for a writ of certiorari to and including September 24, 1955, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

## QUESTIONS PRESENTED

1. Whether refusal of the court to grant, on the day of trial, 19 months after the indictment was filed, a writ of habeas corpus *ad testificandum* for the production of two codefendants who were in prison constituted an abuse of discretion.

2. Whether petitioner was denied effective representation of counsel by reason of the trial court's refusal of a continuance to enable him to secure new counsel on the day of trial.

3. Whether the sentence was excessive.

## RULE INVOLVED

Rule 17, Federal Rules of Criminal Procedure, in pertinent part provides:

### RULE 17. SUBPOENA

* * * * *

(b) Indigent Defendants.

The court or a judge thereof may order at any time that a subpoena be issued upon motion or request of an indigent defendant. The motion or request shall be supported by affidavit in which the defendant shall state the name and address of each witness and the testimony which he is expected by the defendant to give if subpoenaed, and shall show that the evidence of the witness is material to the defense, that the defendant cannot safely go to trial without the witness and that the defendant does not have sufficient means and is actually unable to pay the fees of the

witness. If the court or judge orders the subpoena to be issued the costs incurred by the process and the fees of the witness so subpoenaed shall be paid in the same manner in which similar costs and fees are paid in case of a witness subpoenaed in behalf of the government.

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**STATEMENT**

Petitioner was charged in Counts IV and V of a five count indictment with sale of one-quarter of an ounce of heroin and possession of ten ounces of heroin, in violation of the federal narcotic laws, 21 U. S. C. 173–174. Count I charged a conspiracy to violate the federal narcotic laws, 18 U. S. C. 371. (R. 6–10.)

Petitioner was found guilty by the jury and sentenced to five years on each count, to run consecutively (R. 11–12, 40). On appeal, the judgment was unanimously affirmed (Pet. App. 12).

Two co-defendants, Anthony Musarra and Nicholas Constantino, were joined with Paccione in the conspiracy charge under Count I. Both were named as defendants in Counts II and III charging sales of one-quarter of an ounce of heroin on two separate dates, and Musarra was joined with Paccione on Count IV charging a sale of heroin. (R. 6–10; Pet. 3.) They entered pleas of guilty and were sentenced to four years imprisonment (Pet. 3).

The proceedings, insofar as they are relevant to issues raised in the petition for certiorari, may be summarized as follows:

1. The indictment against petitioner was filed on May 29, 1953 (R. 1). After repeated delays (Pet. App. 11), the trial began and a jury was selected on Friday, December 10, 1954. The case was adjourned until December 14 and again to December 16. Then, because of the illness of petitioner's counsel, Mr. Vecchiarello, it was further adjourned until Monday, December 20 (R. 46), when the actual taking of testimony began (Pet. 3).

On December 20, petitioner's attorney, for the first time, made an application to the court to subpoena co-defendants Musarra and Constantino from prison as witnesses for the petitioner (R. 43; Pet. App. 11). For a period of approximately a month prior to trial, the question of the production of the two co-defendants as witnesses for the defendant had been discussed. On Monday, December 6, 1954, government counsel had agreed to an adjournment to Wednesday, December 8, 1954, to permit petitioner's counsel to visit the two co-defendants in Milan, Michigan. At the same time, government counsel asked Mr. Vecchiarello to indicate when he returned whether he would want the two co-defendants produced, so that a trial date could be set which would allow for their production. (R. 44–45.)

On Wednesday, December 8, 1954, Mr. Vecchiarello stated that petitioner was ready for trial, without any reference to a request for production of the two co-defendants as witnesses on behalf of the defendant (R. 45). On Friday of that same week, Mr. Vecchiarello mentioned to the judge the possibility of having them brought back at government expense (R. 45), but he failed to make any formal application to have them subpoenaed pursuant to Rule 17 (b) of the Federal Rules of Criminal Procedure (Pet. App. 12).

When application for a subpoena was finally made on December 20, 1954, counsel stated that petitioner would not be able to pay for bringing in the witnesses immediately, but could "in a few days or so" (R. 44). The court said it would not adjourn the trial for this purpose and denied the application as untimely (R. 45). Petitioner neither offered to pay for their production immediately, nor did he apply to have them subpoenaed pursuant to Rule 17 (b) (R. 45).[1]

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[1] In the petition for certiorari (Pet. 4), appellant refers to the circumstance that his counsel, Mr. Vecchiarello, had initially been misinformed as to where these two witnesses were located, but fails to state that his counsel was subsequently correctly informed on this matter and in fact interviewed them about December 6 or 7, 1954, approximately two weeks prior to making the application for a subpoena (R. 14, 44–45).

Mr. Pennoyer, the Assistant United States Attorney, in opposing the application for a subpoena, stated, without

Immediately after the court had denied the application for a writ of habeas corpus *ad testificandum*, petitioner's attorney applied for a continuance to enable petitioner to engage another attorney (R. 45). Upon being informed that petitioner already had other counsel in mind, the trial judge granted a recess so that petitioner could contact him, although the court stated that he could not see why the proposed counsel was not there that morning if the petitioner wanted to substitute him (R. 47–48). When the judge learned that the proposed counsel could not be there that day, he refused to delay the trial further in view of the late date of the application, and asked Mr. Vecchiarello to continue to represent petitioner (R. 48). However, the court

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contradiction from Mr. Vecchiarello (R. 44–45):

> I think it is extraordinary that this application is being made at this time. For a period of approximately a month the question of these witnesses being brought in was discussed with Mr. Vecchiarello. I misinformed him on one occasion that they had arrived at the prison in Milan, Michigan, and he actually went out there and they weren't there. This was about three or four weeks ago. On his return I apologized to him and I told him that I would definitely ascertain when they arrived and let him know.
>
> Thereupon the case was on the calendar for two weeks ago today, a Monday. Mr. Vecchiarello asked me for an adjournment to permit him to travel out there to Milan to speak to these prisoners. I agreed to give him until Wednesday of that week and asked to indicate when he returned whether he would want the witnesses brought back so that we could then set a trial date with time for him to bring them back.

stated that the proposed counsel or any other lawyer could join petitioner's staff any time they would like to have him (R. 48).

2. The evidence adduced at the trial may be summarized in pertinent part as follows:

On May 2, 1953, Musarra telephoned Davis, an undercover agent of the Federal Narcotics Bureau, and agreed to sell him one-quarter of an ounce of "pure" heroin for $160. Davis met Musarra on May 6 and the latter told Davis that he had to make a telephone call to "his man." Upon Musarra's return, they went to meet Paccione who was introduced to Davis as "Angelo". (R. 50–52.) Paccione handed one-quarter of an ounce of heroin to Musarra, who handed it to Davis in exchange for $160 (R. 53). Paccione then told Davis in Musarra's presence that for future deliveries of heroin he need only call Musarra, let him know how much he wanted and Davis could then pick it up in a car which Paccione would have parked in a certain driveway (R. 53).

On May 8, 1953, at a pre-arranged meeting place, Davis met Constantino who informed Davis "They're bagging it up now, and Angelo will be over at 9:30" (R. 56–57). When Paccione appeared he did not have the heroin with him and instructed Davis to proceed to another place (R. 57). Upon arriving there, Paccione left the car, but returned in a few moment stating "I've got the stuff" (R. 58). As they drove away, Pac-

cione cautioned Davis "not to ever trust the kids [Musarra and Constantino] with that kind of money, indicating the thousand dollars" (R. 59).

Shortly thereafter Davis stopped the car, confronted Paccione with his badge of office and a revolver, identified himself and told Paccione he was under arrest (R. 60). Davis told him to stand still and get up against the wall but Paccione broke and ran out into the street. Davis fired one shot into the air. When Paccione did not stop, Davis fired at Paccione's legs. When Paccione still kept running, Davis fired toward his hip and Paccione fell. (R. 15.)

3. At the time of sentence, the government pointed out that the two co-defendants were considerably younger than Paccione, that Paccione was the senior member of the group and the supplier for the two younger men (R. 38-39).

The court stated (R. 40):

> Now, Mr. Paccione, I don't expect to see a case for a long time in which there is so little that can be said in behalf of the defendant at time of sentence. I am going to give you an extremely heavy sentence. I am going to give you the maximum which I can impose of five years on each count, to run consecutively.
>
> I have seen in the Court of General Sessions and at other places the product of the people who become dependent on narcotics. In the case before this I had to sentence a man who was a peddler of

> narcotics, who compared to you was a very petty person indeed, and I see before me now the person who not only takes advantage of the weakness of those who need narcotics, but who uses people to become peddlers of this stuff.

**ARGUMENT**

1. There is no merit in petitioner's contention that he was deprived of due process because of the trial court's refusal to subpoena his co-defendants as witnesses (Pet. 2–3, 6–7). The judge was clearly justified in denying the application and refusing further to delay the trial under the circumstances presented by this record.

Petitioner had every opportunity to seek a writ of habeas corpus *ad testificandum* at least a month prior to the trial (R. 44; *supra,* pp. 4–6). After petitioner's attorney had returned from his interview with the prospective witnesses, he stated on December 8 (the actual trial began on December 20) that the petitioner was ready for trial, without any reference to a request for production of the two co-defendants as witnesses (R. 45; *supra,* p. 5). Even when he finally made an application for a subpoena on the day the trial started, he did not act as if he considered the witnesses indispensable. When the judge made it clear that he would not delay the trial, there was no offer to pay for their production immediately instead of "in a few days or so" (R. 44; *supra,* p. 5). Neither did he apply to have

them subpoenaed pursuant to Rule 17 (b) of the Federal Rules of Criminal Procedure (R. 45; *supra,* p. 2). He made no effort to show that the testimony which these witnesses would give would be pertinent (R. 43, 44, 45). It seems clear that the request for production was merely a dilatory tactic.[2]

It is fundamental that a trial court's action upon an application for a continuance is purely a matter of discretion and is not subject to review unless it is clearly shown that such discretion has been abused. *Isaacs* v. *United States,* 159 U. S. 487, 489; *Goldsby* v. *United States,* 160 U. S. 70, 72. The granting of a continuance for the purpose of producing prisoner witnesses is within the sound discretion of the judge. *Neufield* v. *United States,* 118 F. 2d 375, 380 (C. A. D. C.), certiorari denied, 315 U. S. 798. And since no formal application to have the witnesses subpoenaed under Rule 17 (b) was ever made (Pet. App. 12; *supra,* p. 5), the court was not required to order production of the two witnesses. *Meeks* v. *United States,* 179 F. 2d 319, 322 (C. A. 9).

2. Petitioner contends that he was denied effective representation of counsel by reason of the trial court's refusal of a continuance (Pet. 5–6). As in the case of the prior refusal to delay the

[2] The affidavit of petitioner's attorney, made more than three months after the actual trial, that he considered the testimony indispensable, is inconsistent with his conduct before trial.

trial (R. 45; *supra*, pp. 9–10), no abuse of discretion was shown. *Isaacs* v. *United States*, 159 U. S. 487, 489; *Goldsby* v. *United States*, 160 U. S. 70, 72.

Mr. Vecchiarello had represented petitioner in this case for a year and a half and had never previously indicated his disfavored position (R. 47; Pet. App. 11). Not until after the motion for a continuance for production of witnesses was denied was the motion to substitute counsel made. That was ten days after the selection of the jury for the trial. The judge stated several times that he had no objection to bringing in new counsel. However he properly refused to delay further the commencement of the trial for that purpose. (R. 45, 46, 47.)

As the Court of Appeals for the Second Circuit stated in *United States* v. *Mitchell*, 138 F. 2d 831, certiorari denied, 321 U. S. 794:

> * * * when a jury case is already on trial in a district with a crowded calendar such as obtains in the Southern District of New York, a continuance for the obtaining and indoctrination of new counsel would be disruptive of the court's business and could not be claimed under the circumstances except for rather exceptional cause.

3. Petitioner's contention that the sentence was excessive (Pet. 2, 7–8) raises no question for review.

As the Court of Appeals for the Second Circuit stated in *United States* v. *Rosenberg,* 195 F. 2d 583, 604, certiorari denied, 344 U. S. 838:

> Unless we are to over-rule sixty years of undeviating federal precedents, we must hold that an appellate court has no power to modify a sentence. "If there is one rule in the federal criminal practice which is firmly established, it is that the appellate court has no control over a sentence which is within the limits allowed by a statute." *Gurera* v. *United States,* 8 Cir., 40 F. 2d 338, 340.

See also memorandum opinion of Mr. Justice Frankfurter when this Court denied a petition for rehearing in *Rosenberg* v. *United States,* 344 U. S. 889, 890. The district court's decision to impose a severe sentence stems, as the court indicated, from the evidence in this case showing that petitioner was the ringleader of an organized group selling narcotics.

## CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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